Filed 4/26/19 P. v. Andrade CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

LEONARDO ANDRADE,

Defendant and Appellant.

F075910

(Super. Ct. No. BF165168A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Brian M. McNamara, Judge.

John L. Staley, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Robert Gezi, Deputy Attorneys General, for Plaintiff and Respondent.

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Leonardo Andrade (defendant) stands convicted, following a jury trial, of second degree robbery (Pen.[1] Code, § 212.5, subd. (c); count 1), making a criminal threat (§ 422; count 2), and dissuading a witness by force or threat of force or violence (§ 136.1, subd. (c)(1); count 3). Following a bifurcated court trial, he was found to have committed a serious felony (§ 667, subd. (a)) that was also a strike (§§ 667, subds. (c)-(j), 1170.12, subds. (a)-(e)), and to have served a prior prison term (§ 667.5, subd. (b)).[2] He was sentenced to a total term of 11 years in prison and ordered to pay various fees, fines, and assessments. We hold: (1) Defendant's mistrial motion, based on a witness's volunteered statement, was properly denied; (2) Any error with respect to the admission of evidence concerning counts 2 and 3 was harmless; (3) The sentence on count 2 must be stayed pursuant to section 654; (4) The evidence was sufficient to prove defendant previously was convicted of a serious felony; and (5) The matter must be remanded to afford the trial court the opportunity to exercise its new discretion whether to strike or dismiss the section 667, subdivision (a) enhancement.

FACTS

As of July 16, 2016, Juan M. resided in Bakersfield.[3] He kept horses on his land, and sold cowboy hats and related items.

On July 16, defendant and two other men — Miguel and Gabino — showed up at Juan's house and asked to borrow the horses.[4] Juan refused, because the horses were not

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1 All statutory references are to the Penal Code unless otherwise stated.

2 The jury acquitted defendant of the greater offense charged in count 1, to wit, committing a robbery within an inhabited dwelling house while acting in concert. (§ 213, subd. (a)(1)(A).) The jury deadlocked on a charge of misdemeanor battery (§ 243, subd. (a); count 4), and that charge subsequently was dismissed by the prosecution. The court found not true a second prior prison term allegation.

3 For purposes of privacy, some persons are referred to by their first names and/or initials. No disrespect is intended.

Undesignated dates in the statement of facts are to the year 2016.

shod properly. Miguel let two of the horses out and left the gate open. Juan repenned the animals.

The conversation was friendly to this point, but then Miguel asked for a specific hat that was in the van Juan used for deliveries. Juan told him the hat had already been sold, but offered to give him a different one. Miguel said he was going to take the hat he wanted. Juan told him no, but Miguel took it and was going to leave with it. Juan took it from his hand, and Miguel got into a car. Defendant then came to Juan and asked him to give Miguel the hat. Defendant said he would pay Juan for it later. Juan said he could not, because the hat had been sold.

Defendant went to the car. Miguel returned and hit Juan on the cheek with his fist. Juan hit him back, and Miguel fell. Miguel got up and the two started wrestling and fighting.

Meanwhile, Adrian P., a friend of Juan's who kept his horse at Juan's house, arrived to feed his horse. Juan and Miguel stopped wrestling. Adrian was then beat up, but Juan did not see who hit him.

Juan started to go inside his house. His wife, who was pregnant, was crying. As he was going in, defendant put his shoe in the way. Defendant was angry and speaking in English and Spanish. He said he thought a lot of Juan and they had a good friendship, but everything was "going to go to shit" over a hat. In the living room, defendant pushed Juan. Juan saw through the window that Miguel had numerous hats, which he took to his car. At some point, defendant also took some hats, but then he gave them back to Juan, saying he was not interested in them.

Defendant was speaking in English, which Juan did not understand. Juan was nervous. His wife was yelling. Juan's sister-in-law and nephew said the police should be

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4 The three had already been drinking when they arrived, and they gave Juan a beer. Juan believed Miguel was drunk.

called. Defendant went out, then started arguing with the neighbor. Defendant and his companions then got in a black or dark green Honda and left. Right after defendant exited the house, Juan's wife and nephew, who both spoke English, said defendant told Juan that he was going to come back and kill everyone in the house. At some point that day, defendant told Juan, "Over a hat I'm going to kill your family." Adrian heard defendant tell Juan that he would kill Juan and all his family if Juan called the police.

While this was going on, Juan's neighbor across the street heard screaming. When she went outside, she saw a car with which she was not familiar. There were three men in Juan's yard. Two went up to the porch and pushed their way into the house. The third remained on the porch. The neighbor called the police.[5] She could tell Juan and his wife were inside the home. After the two men went inside, the neighbor heard a lot of screaming. The two men came back out after a few minutes. Juan also came outside. There was yelling and shoving in the front yard. The two that had pushed their way into the home opened Juan's van and took a bunch of hats and merchandise that he sold, and started shoving everything into a black Honda. They then got into the Honda and the driver pulled into the middle of the street. The man who did not go into the house walked toward the street, then yelled at the neighbor, asking if she was on the phone with the police. When she said yes, he called her a rat, and told her that she had killed her whole family and that they would come back and shoot up her home. This man then got into the backseat of the Honda, and the car left.

Kern County Sheriff's Deputy Sanchez was dispatched to the M. residence, where he contacted Juan and Adrian. Both men were scared and nervous. Adrian's right eye was swollen completely shut. Juan's wife was also present. She was scared. She asked deputies to stay there the whole night to watch the house. Juan identified defendant from a photographic lineup as the person who came into his home and threatened him.

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5 A recording of her 911 call was played for the jury.

Around 30 to 45 minutes after deputies arrived, defendant drove by Juan's house in a black BMW and waved at Juan. Sanchez and other deputies went after the vehicle. They located it about three blocks away. The car was stopped on the side of the road. The key was still in the ignition and the radio was still on, but nobody was in the vehicle. Deputies were unable to locate defendant, who had been the only person in the vehicle.

DISCUSSION

I

MISTRIAL MOTION

Defendant contends the judgment must be reversed, because (1) the trial court erred by denying his motion for a mistrial based on a statement volunteered by Adrian, and (2) the trial court's admonition did not cure the error. We find no cause for reversal.

A. Background

On direct examination, Adrian described being struck by two people. This ensued:

"Q. [by the prosecutor] What happened then?

"A. And then Mr. Andrade put his hand here on my neck, and then he took me away from there.

"Q. What happened next?

"A. Then he told me not to throw. I don't know what he meant by not throw.

"Q. What happened next?

"A. And then when he pulled me away from there, he said, 'I'm a Sureño, what do you throw?'

"Q. What happened next?

"A. And then a sister-in-law . . . had called the police.

"[DEFENSE COUNSEL]: I will move to strike that. Hearsay.

"THE COURT: Overruled."

At the next recess, defense counsel moved for a mistrial on the ground Adrian "right now just dropped a little hand grenade in front of this jury." He argued Adrian accused defendant of being a gang member, counsel had had no notice such an accusation was going to be made, and he did not cross-examine Adrian about it because he wanted it downplayed. Counsel asserted the jury had been tainted and a mistrial should be granted.

The prosecutor responded that the witness was not offering his opinion, but was quoting a statement defendant made to him. The prosecutor agreed it came as a surprise, but argued the meaning of the term "Sureño" was not explained, the subject was not explored further, and a curative instruction would be sufficient to remedy the situation. The prosecutor also noted no timely objection was made.

The court agreed there was no timely objection. It opined that if the term was understood by the jury, it was prejudicial; however, it could be cured by instruction or admonition if counsel so desired.[6] The court concluded: "In terms of what counsel are saying, it all goes back to the situation that the Court was presented with, which was nothing at the time. It certainly heard it. There was no indication from counsel. [¶] So with that I'm willing to listen to counsel, if they want to get together and provide the Court with some admonition or instruction, I'll certainly consider it. But at this time that motion is denied."

Defense counsel subsequently asked the court to reconsider its ruling. To this end, he filed a written motion to dismiss. The court announced its previous ruling would stand, but it agreed to read the parties' stipulation on the matter to the jury. The court subsequently told jurors: "Adrian [P.] used the word Sureño during his testimony. This word is stricken, and the jury should not consider this word for any purpose during

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[6] The court found the testimony came as a surprise to both attorneys, but ordered them to instruct any remaining witnesses not to mention it again.

deliberations. [¶] With that, again, this is a direction from the Court at this time and must be followed at this time by the jury."

B. Analysis

"A motion for mistrial is directed to the sound discretion of the trial court." (*People v. Jenkins* (2000) 22 Cal.4th 900, 985.) Accordingly, in reviewing a trial court's ruling on such a motion, we apply the deferential abuse-of-discretion standard. (*People v. McLain* (1988) 46 Cal.3d 97, 113.) We will not reverse unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a miscarriage of justice. (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 390.)

"A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction." (*People v. Haskett* (1982) 30 Cal.3d 841, 854.) Depending upon the circumstances, a witness's volunteered statement can provide the basis for a finding of incurable prejudice. (*People v. Ledesma* (2006) 39 Cal.4th 641, 683.) However, "[w]hether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions." (*People v. Haskett, supra*, 30 Cal.3d at p. 854.) A motion for mistrial properly may be refused where the trial court is satisfied that no injustice has resulted or will result from the occurrences of which the party complains. (*People v. Eckstrom* (1986) 187 Cal.App.3d 323, 330; *People v. Guillebeau* (1980) 107 Cal.App.3d 531, 548.)

"[A]dmission of evidence of a criminal defendant's gang membership creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged. [Citation.]" (*People v. Williams* (1997) 16 Cal.4th 153, 193; see *People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.) In the present case, however, the trial court did not abuse its discretion by denying defendant's motion.

First, defendant failed to make a timely and specific objection to the portion of Adrian's testimony he now challenges. Thus, we question whether the claim has been

forfeited. (See *People v. Leonard* (2007) 40 Cal.4th 1370, 1405; *People v. Hayes* (1990) 52 Cal.3d 577, 610.)

Second, assuming the mistrial motion was timely (see *People v. Lucero* (2000) 23 Cal.4th 692, 713; *People v. Jasso* (2012) 211 Cal.App.4th 1354, 1364, fn. 5), the "Sureño" reference was unforeseeable rather than intentionally elicited, fleeting, and not emphasized in any manner. The term was not defined for the jury. The word "gang" was not used, and we will not assume jurors were familiar with the term "Sureño."

Third, even assuming one or more jurors knew the term referenced a gang, the trial court ordered the word stricken and forcefully admonished jurors not to consider it for any purpose. Defendant fails to convince us this was insufficient to cure any harm. " 'We presume that jurors comprehend and accept the court's directions. [Citation.] We can, of course, do nothing else. The crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions.' [Citation.]" (*People v. Homick* (2012) 55 Cal.4th 816, 867; see *People v. Penunuri* (2018) 5 Cal.5th 126, 148-149 [admonition cured any harm caused by witness's brief reference to Mexican Mafia]; see also *People v. Alexander* (2010) 49 Cal.4th 846, 914-915 [mistrial motion properly denied; jurors presumed to act in accordance with instruction to disregard witness's reference to defendant's previous involvement in triple murder]; *People v. Avila* (2006) 38 Cal.4th 491, 574 [mistrial motion properly denied where court admonished jury not to consider for any purpose witness's testimony referring to defendant recently having been in prison].)

Because the trial court's admonition cured any harm, we reject defendant's claim the jury's fact finding mission was impaired, in violation of his federal and state constitutional rights. We further reject his claim he was deprived of due process. (Cf. *People v. Albarran* (2007) 149 Cal.App.4th 214, 228-230.)

II

ADMISSION OF HEARSAY AS TO COUNTS 2 AND 3

Defendant contends counts 2 and 3 must be reversed due to the admission of inadmissible hearsay in support thereof.[7] We conclude any error was harmless.

A. Background

On direct examination, Juan testified that when defendant was inside the house, defendant was speaking in English. Juan did not understand any English. The prosecutor asked whether, after people said to call the police, defendant said anything. Juan responded that those who could understand him said he was threatening Juan, but Juan did not understand. Defendant's hearsay objection was sustained and the jury was directed to disregard the answer.

The prosecutor subsequently questioned Juan about what he told Sanchez when Sanchez took his statement that same day. This ensued:

> "Q. [by the prosecutor] Do you remember telling him that the defendant had told you that he was going to come back and kill everyone in your house?
>
> "A. Well, that was said in English, and my wife told me what he had said, and my nephew that was there, too, and —
>
> "[DEFENSE COUNSEL]: Objection.
>
> "THE WITNESS: — and my nephew was there who spoke English, too.
>
> "[DEFENSE COUNSEL]: Objection. Move to strike. Hearsay. Request the jury be instructed to disregard that.
>
> "THE COURT: On this one he qualified it; so I'll overrule it. The answer will stand subject to the weight given to the answer of the witness at this time. Overruled.
>
> "BY [THE PROSECUTOR]:

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[7] In his heading for this issue, defendant says reversal on these counts is required because the only evidence offered in support thereof was inadmissible hearsay. Despite the somewhat ambiguous wording, he does not present a claim of insufficient evidence, but rather one of improperly admitted evidence, as the Attorney General recognizes.

"Q. When did she tell you that?

"A. When he went out.

"Q. So right after it happened?

"A. Uh-huh.

"Q. Could you tell whether or not your wife was upset when she was telling you this?

"[DEFENSE COUNSEL]: Objection. Irrelevant. [¶] . . . [¶]

"THE COURT: Goes to the weight. This is impeachment; so it's not that situation. [¶] So with that, overruled. [¶] . . . [¶]

"BY [THE PROSECUTOR]:

"Q. When your wife told you about the statement the defendant had made, was she upset?

"A. Yes. She was crying. [¶] . . . [¶]

"Q. Now, do you remember telling Deputy Sanchez that when someone — that you told your wife to call the police?

"A. Yes, yes, I remember that. All of us were telling my wife to call the police. But the neighbor lady already was on the phone. When she came up to my fence, she had the phone up to her ear, and she was recording with the phone.

"[DEFENSE COUNSEL]: Your Honor, I object to that as lacking foundation, hearsay, speculation.

"THE COURT: Given the scenario presented, I will overrule it given the dynamics. Anyway, there is no statement. Overruled.

"BY [THE PROSECUTOR]:

"Q. Do you remember telling Deputy Sanchez that when you were asking your wife to call the police, that the defendant told you if you called law enforcement, he was going to come back and kill everyone?

"[DEFENSE COUNSEL]: Objection. That misstates the testimony of this witness.

"THE COURT: Overruled.

"THE WITNESS: Yes.

"BY [THE PROSECUTOR]:

"Q. Did that happen? [¶] . . . [¶]

"A. Yes. When I talked to the police officer, that's how it went."

Defendant subsequently moved for a mistrial. Citing *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), defense counsel argued he was being denied meaningful cross-examination. The prosecutor responded that, with respect to *Crawford*, the defense had the opportunity to cross-examine Juan on the witness stand; what Juan told the deputy was admissible as a prior inconsistent statement; the wife's statement was not testimonial hearsay and was made while she was still under the stress of the event, so it fell within a hearsay exception; and the wife's statement was admissible in any event, because it was Juan's explanation of his prior inconsistent statement. Defense counsel responded that he could not "cross-examine a parrot."

The trial court stated:

> "I'm going to tell you what the Court's heard. Focus on that. I have a witness who takes the stand. It's his testimony. And the testimony I have is as follows. He made statements and so on which he got from his wife and third parties and so on. I get that. That's no issue. And it comes out, that goes to the weight of his statement. He also said he didn't understand it. He also said he doesn't understand English. So that's what's before the Court.
>
> "Now, then, in fairness to [the prosecutor], he has got what was told to the deputy at the time in the night. He is entitled to do that, given what transpired in this event.
>
> "Given that, did he make the statement? The question is, did he make the statement or not? And if it's yes, that's fair. But the understanding of the statement and so on can be cross-examined, et cetera; so there is no *Crawford* with that situation. So that's the status there. That's quite straightforward in that regard. [¶] . . . [¶]

"So within the context of what we are talking about, the way it's being handled, is simply we have got a witness who did make statements to police, which, to some extent, are inconsistent of what he said today. But there is certainly more understanding of what he said and why he said it. And that's fair.

"I could certainly put myself in a position where if something is said to me and I understand it and I stated it to the police and I didn't tell the police at the time where I got it, that's totally understandable. But that's a weight issue that this jury certainly will evaluate it. And that's for both sides.

"That's the way the Court ruled in this case. The questions asked were fair based on the police report presented. . . .

"And based on the police report, we are all understanding that the Court can interpret everyone believed these statements were made by the witness in this case to the deputy. Today we find out he got them from somebody else. That's my understanding of the case at this time. So that would be, I'm assuming, the same as the jury at this time.

"So within the context of asking for a mistrial, that's denied.

"In terms of your objections, fair enough. But given the nature of the objections, the Court felt it ruled properly based on the status of what either counsel were trying though [*sic*] do."

B. <u>Analysis</u>

"[A] statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated" constitutes hearsay. (Evid. Code, § 1200, subd. (a).) Except as provided by law, such evidence is inadmissible. (*Id.*, subd. (b).)

The proponent of hearsay evidence has the burden of establishing the foundational requirements for its admissibility under an exception to the hearsay rule. (*People v. Blacksher* (2011) 52 Cal.4th 769, 819-820.) Where multiple levels of hearsay are involved, an exception must be shown at each level. (*People v. Sanchez* (2016) 63 Cal.4th 665, 675.) "[A] trial court has broad discretion to determine whether a party has established the foundational requirements for a hearsay exception [citation] and '[a]

ruling on the admissibility of evidence implies whatever finding of fact is prerequisite thereto[.]' [Citation.] We review the trial court's conclusions regarding foundational facts for substantial evidence. [Citation.] We review the trial court's ultimate ruling [admitting or excluding evidence] for an abuse of discretion [citations], reversing only if ' "the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." ' [Citation.]" (*People v. DeHoyos* (2013) 57 Cal.4th 79, 132; see *People v. Thompson* (2010) 49 Cal.4th 79, 128.)

The following statements appear to be at issue here: (1) defendant's statements to Juan and/or Juan's wife; (2) Juan's statement to his wife to call the police; (3) the wife's statement to Juan concerning defendant's threat; and (4) Juan's statements to Sanchez. We will assume defendant's claims of error as to each have been preserved for appeal, either because he objected at trial or because an objection would have been futile. (See *People v. Dykes* (2009) 46 Cal.4th 731, 756; *People v. Hill* (1998) 17 Cal.4th 800, 820.)

We can briefly dispense with two issues. First, defendant's statements came within the exception to the hearsay rule for statements of a party. (Evid. Code, § 1220; *People v. Anderson* (2018) 5 Cal.5th 372, 403.)[8] Second, there was no confrontation clause violation. Except for Juan's statements to Sanchez, the statements at issue were nontestimonial and therefore "fell outside the reach of confrontation clause protections." (*People v. Brooks* (2017) 3 Cal.5th 1, 39; accord, *People v. Cage* (2007) 40 Cal.4th 965, 981; see *Davis v. Washington* (2006) 547 U.S. 813, 823-826; *Crawford, supra,* 541 U.S. at p. 51.) Admission of Juan's statements to Sanchez did not violate *Crawford*, because Juan — the declarant — testified and thus was subject to cross-examination. (*People v. Bryant, Smith and Wheeler, supra,* 60 Cal.4th at p. 413.) Moreover, admission of a witness's prior statements pursuant to Evidence Code section 1235 (which we discuss,

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8 Evidence Code section 1220 provides: "Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party . . . ."

post) does not violate the confrontation clause. (*Bryant, Smith and Wheeler*, *supra*, at p. 414.)

We turn now to the recitation of defendant's threat by Juan's wife.[9] The prosecutor proffered the statements by Juan's wife under the exception to the hearsay rule for spontaneous (excited) utterances. This exception is codified in Evidence Code section 1240.[10]

" 'To render [statements] admissible [under the spontaneous declaration exception] it is required that (1) there must be some occurrence startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting; (2) the utterance must have been before there has been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance; and (3) the utterance must relate to the circumstance of the occurrence preceding it.' [Citations.]" (*People v. Poggi* (1988) 45 Cal.3d 306, 318.) For purposes of this exception to the hearsay rule, " '[s]pontaneous' does not mean that the statement be made at the time of the incident, but rather in circumstances such that the statement is made without reflection. [Citations.]" (*People v. Hughey* (1987) 194 Cal.App.3d 1383, 1388.)

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9 Contemporaneous translation does not add a layer of hearsay when the translator simply acts as a " 'language conduit' " so that the statement is considered that of the declarant. (*Correa v. Superior Court* (2002) 27 Cal.4th 444, 455, 458-459.) The record does not suggest Juan's wife was acting as a translator for defendant. Accordingly, her recounting of his threat is properly treated as hearsay.

10 Evidence Code section 1240 provides: "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception." A statement made by another and personally perceived by the declarant can constitute an "act" or "event" within the meaning of the statute. (See *People v. Arias* (1996) 13 Cal.4th 92, 150.)

"Whether the requirements of the spontaneous statement exception are satisfied in any given case is, in general, largely a question of fact. [Citation.] The determination of the question is vested in the court, not the jury. [Citation.] In performing this task, the court 'necessarily [exercises] some element of discretion . . . .' [Citation.]" (*People v. Poggi*, *supra*, 45 Cal.3d at p. 318.) "A number of factors may inform the court's inquiry . . . . Such factors include the passage of time between the startling event and the statement, whether the declarant blurted out the statement or made it in response to questioning, the declarant's emotional state and physical condition at the time of making the statement, and whether the content of the statement suggested an opportunity for reflection and fabrication. [Citations.] [The California Supreme Court] has observed, however, that these factors 'may be important, but solely as an indicator of the mental state of the declarant.' [Citation.] For this reason, no one factor or combination of factors is dispositive. [Citations.]" (*People v. Merriman* (2014) 60 Cal.4th 1, 64-65.) The preliminary facts that bring statements within the exception require only proof by a preponderance of the evidence. (*People v. Tewksbury* (1976) 15 Cal.3d 953, 966.)

The record clearly establishes the statements of Juan's wife fell within this exception. The evidence was uncontradicted that when she relayed defendant's threat to Juan, she was scared and crying because of what happened. She was still scared and upset when deputies arrived and Sanchez spoke with her. Defendant's hearsay objection was properly overruled.

Although our theory of admissibility differs from that of the trial court, " ' "[n]o rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion." [Citation.]' [Citation.]" (*People v. Zapien* (1993) 4 Cal.4th 929, 976; accord, e.g., *People v. Chism*

(2014) 58 Cal.4th 1266, 1295, fn. 12; *People v. Smithey* (1999) 20 Cal.4th 936, 972; *People v. Marquez* (1992) 1 Cal.4th 553, 578.)

Defendant says this rule should not be applied to an evidentiary ruling that required the trial court to make findings of fact, and that this court should not make factual findings when the facts had to be determined by the trial court. He does not cite any authority to support his claim, however, and express findings by the trial court on the foundational facts are not required. (See *People v. Hovarter* (2008) 44 Cal.4th 983, 1011, fn. 12.) Moreover, as we have observed, the evidence on the issue was uncontradicted. Defense counsel recognized the hearsay exception being advanced by the prosecutor — expressly referring, during argument on his mistrial motion, to "an excited utterance" — and had ample opportunity to address the matter, either by argument or, as the trial court noted, by subpoenaing other witnesses. Accordingly, we reject the assertion that applying the "right ruling, wrong reasoning" rule is fundamentally unfair because defendant was not provided notice of the hearsay exception we invoke and did not have an opportunity to address it.

Defendant next says Juan's testimony about the threat should have been excluded under Evidence Code section 702, because Juan lacked personal knowledge of the statements defendant made in English.[11] He is wrong.

"Except to the extent that an expert witness may give opinion testimony not based on personal knowledge, the testimony of a witness concerning a particular matter is inadmissible unless the witness has personal knowledge of that matter. [Citation.] Personal knowledge means a present recollection of an impression derived from the

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11 Evidence Code section 702 provides: "(a) Subject to [Evidence Code] Section 801, the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter. Against the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter. [¶] (b) A witness' personal knowledge of a matter may be shown by any otherwise admissible evidence, including his own testimony."

exercise of the witness's own senses. [Citation.] A witness cannot competently testify to facts of which he or she has no personal knowledge. [Citation.]" (*Alvarez v. State of California* (1999) 79 Cal.App.4th 720, 731, overruled on another ground in *Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 74, fn. 3.) The personal knowledge requirement extends to statements of hearsay declarants. (*People v. Cortez* (2016) 63 Cal.4th 101, 123-124.) Testimony may be excluded for lack of personal knowledge only if no jury reasonably could find the witness has such knowledge. (*Id*. at p. 124.) "Thus, '[a] witness challenged for lack of personal knowledge must . . . be allowed to testify if there is evidence from which a rational trier of fact could find that the witness accurately perceived and recollected the testimonial events. Once that threshold is passed, it is for the jury to decide whether the witness's perceptions and recollections are credible. [Citation.]' " (*Ibid*., italics omitted.)

In the present case, there clearly was evidence from which a rational jury could find Juan's wife had personal knowledge of what defendant said, and Juan had personal knowledge of what his wife said. Thus, the requirements of Evidence Code section 702 were satisfied. (Cf. *People v. Valencia* (2006) 146 Cal.App.4th 92, 103-104.)

We turn now to whether Juan's testimony about what he told Sanchez was admissible. The prosecutor argued for admission as prior inconsistent statements, and the trial court appears to have agreed with that position.

" 'A statement by a witness that is inconsistent with his or her trial testimony is admissible to establish the truth of the matter asserted in the statement under the conditions set forth in Evidence Code sections 1235 and 770.' [Citation.]" (*People v. Chism*, *supra*, 58 Cal.4th at p. 1294.)[12] " 'The "fundamental requirement" of [Evidence

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12 Evidence Code section 1235 provides: "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with [Evidence Code] Section 770." Evidence Code section 770 provides: "Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any

Code] section 1235 is that the statement in fact be *inconsistent* with the witness's trial testimony.' [Citation.] ' "Inconsistency in effect, rather than contradiction in express terms, is the test for admitting a witness'[s] prior statement . . . ." ' [Citation.]" (*People v. Cowan* (2010) 50 Cal.4th 401, 462.)

Defense counsel elicited from Sanchez that in his testimony, Juan added things that he did not tell Sanchez. Based on Juan's testimony and the prosecutor's argument in response to defendant's mistrial motion, it is apparent Juan did not tell Sanchez that he learned of defendant's threat from his wife and nephew. Accordingly, there was at least some inconsistency, about which the parties were free to examine Juan. (*People v. Cowan*, *supra*, 50 Cal.4th at p. 463.)

Were we to find Juan's testimony concerning what he told Sanchez was erroneously admitted, however, we would conclude the error was harmless.[13] Contrary to defendant's claim, admission of the evidence did not render his trial fundamentally unfair in violation of due process (see *People v. Falsetta* (1999) 21 Cal.4th 903, 913; *Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920) or somehow violate his right to an accurate jury determination of the facts (see *United States v. Gaudin* (1995) 515 U.S. 506, 510). Accordingly, the error — if there was one — is one of state law only, and is reversible "only if a reasonable probability exists that the jury would have reached a different result had this evidence been excluded. [Citations.]" (*People v. Whitson* (1998) 17 Cal.4th 229, 251; see *People v. Watson* (1956) 46 Cal.2d 818, 836; see also *People v. Merriman*, *supra*, 60 Cal.4th at p. 69; *People v. Arias*, *supra*, 13 Cal.4th at p. 153.)

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part of his testimony at the hearing shall be excluded unless: [¶] (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or [¶] (b) The witness has not been excused from giving further testimony in the action."

13 We reach the same conclusion with respect to Juan's testimony he told his wife to call the police.

No such probability exists here. Juan testified his wife told him that defendant said he was going to come back and kill everyone in the house. The statements of Juan's wife concerning defendant's threat were properly admitted under Evidence Code section 1240; hence, their admission neither deprived defendant of due process nor violated the confrontation clause (*People v. Merriman*, *supra*, 60 Cal.4th at p. 67). Since they were admissible under an exception to the hearsay rule, Juan could have testified to them directly, and the fact he related them at trial in the context of what he told Sanchez is immaterial. The wife's statements were corroborated by the fact defendant drove back by Juan's house not long after making the threat. In addition, Juan testified defendant told him, "Over a hat I'm going to kill your family," and that Juan's wife did not tell Juan that.[14] Adrian testified defendant told Juan that he (defendant) was going to kill Juan and all his family if Juan called the police. In light of the evidence, defendant has failed to establish prejudice.

III

SECTION 654

Defendant contends the sentences on counts 2 and 3 should have been stayed pursuant to section 654, because those counts were based on the same conduct as the robbery. The Attorney General concedes the issue as to count 2, but argues separate punishment was properly imposed as to count 3. We agree with the Attorney General.

A. Background

Defendant was convicted, in count 2, of threatening Juan, in violation of section 422. He was convicted, in count 3, of dissuading a witness or victim, to wit, Juan, by threat or force, in violation of section 136.1, subdivision (c)(1). The probation officer

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[14] Defendant argues this could not have been the basis for his convictions, because it was conditional and lacked sufficient immediacy. He cites no authority in support of his claim.

recommended imposition of a consecutive term for each count, on the ground each involved a separate act of violence from the other and from count 1.

At sentencing, defense counsel argued for the imposition of concurrent terms on the ground all three counts involved "the same pretty much operative facts . . . ." The court ordered sentence on both counts to be served concurrently with the sentence imposed on count 1.

B. Analysis

Section 654, subdivision (a) provides in pertinent part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." The purpose of this provision is to ensure that punishment is commensurate with culpability (*People v. Latimer* (1993) 5 Cal.4th 1203, 1211), and it applies to imposition of concurrent as well as consecutive terms (*People v. Fuller* (1975) 53 Cal.App.3d 417, 420; see *In re Wright* (1967) 65 Cal.2d 650, 654-655).[15]

Section 654 "precludes multiple punishment for a single act or indivisible course of conduct punishable under more than one criminal statute. Whether a course of conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the 'intent and objective' of the actor. [Citation.] If all of the offenses are incident to one objective, the court may punish the defendant for any one of the offenses, but not more than one. [Citation.] If, however, the defendant had multiple or simultaneous objectives, independent of and not merely incidental to each other, the defendant may be punished for each violation committed in pursuit of each objective even though the violations share common acts or were parts of an otherwise indivisible

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[15] Defendant is entitled to raise section 654's applicability on appeal despite his failure to raise it at sentencing. (*People v. Scott* (1994) 9 Cal.4th 331, 354 & fn. 17.)

course of conduct. [Citation.]" (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 267-268; see *People v. Harrison* (1989) 48 Cal.3d 321, 335; *Neal v. State of California* (1960) 55 Cal.2d 11, 19, disapproved on another ground in *People v. Correa* (2012) 54 Cal.4th 331, 334.)

"Whether a defendant may be subjected to multiple punishment under section 654 requires a two-step inquiry . . . . We first consider if the different crimes were completed by a 'single physical act.' [Citation.] If so, the defendant may not be punished more than once for that act. Only if we conclude that the case involves more than a single act — i.e., a course of conduct — do we then consider whether that course of conduct reflects a single ' "intent and objective" ' or multiple intents and objectives. [Citations.]" (*People v. Corpening* (2016) 2 Cal.5th 307, 311-312.)

"At step one, courts examine the facts of the case to determine whether multiple convictions are based upon a single physical act. [Citation.]" (*People v. Corpening, supra,* 2 Cal.5th at p. 312.) If step two is reached, the trial court makes a factual determination whether the defendant harbored a separate intent and objective for each offense. (*People v. Osband* (1996) 13 Cal.4th 622, 730.) "When a trial court sentences a defendant to separate terms without making an express finding the defendant entertained separate objectives, the trial court is deemed to have made an implied finding each offense had a separate objective. [Citation.]" (*People v. Islas* (2012) 210 Cal.App.4th 116, 129.)

Where the facts are undisputed, "the application of section 654 raises a question of law we review de novo. [Citations.]" (*People v. Corpening, supra,* 2 Cal.5th at p. 312.) Where the facts are disputed, the trial court's conclusion will be sustained on appeal if supported by substantial evidence. (*People v. Osband, supra,* 13 Cal.4th at pp. 730-731.) On review of the issue in such a situation, we consider the evidence in the light most

favorable to the judgment. (*People v. Williamson* (1979) 90 Cal.App.3d 164, 172.)[16] If we determine the trial court violated section 654, the proper remedy is to stay execution of sentence on the count with the lesser penalty. (*People v. Beamon* (1973) 8 Cal.3d 625, 639-640.)

In the present case, there were separate physical acts, including the taking of the hats by Miguel, defendant's threat to kill Juan's family over a hat, and defendant's threat to kill Juan and his family if Juan called the police. Because the threat referencing a hat was the means of supplying the fear required for perpetration of the robbery (see § 211), section 654 required that sentence for count 2 be stayed (see *In re Jesse F.* (1982) 137 Cal.App.3d 164, 171; see also *People v. Mitchell* (2016) 4 Cal.App.5th 349, 354).

The trial court reasonably could have concluded, however, that the threat to kill Juan and his family if the police were called was intended to intimidate the family so they would not report the robbery, rather than as a means of perpetrating the robbery itself. (See *People v. Watts* (1999) 76 Cal.App.4th 1250, 1265.) Thus, the court reasonably could have concluded that in making this threat, defendant harbored a separate, albeit simultaneous, intent and objective than what he harbored with respect to the robbery and threat to kill over a hat.

Defendant points to the fact the robbery was still in progress when the threat referencing the police was made. (See *People v. Rodriguez* (2015) 235 Cal.App.4th 1000, 1007 [robbery is said to continue through escape to place of temporary safety]; *People v. Estes* (1983) 147 Cal.App.3d 23, 28.) This is not determinative of whether section 654 applies. (*People v. Rodriguez, supra,* 235 Cal.App.4th at p. 1007.) "[D]etermining whether section 654 applies does not turn on whether 'an act occurred in the commission of a crime . . .' [citation], but rather, on whether a defendant entertained ' "multiple criminal objectives[.]" ' " (*Ibid.*) The so-called escape rule "cannot mean

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16 In the present case, our conclusion is the same either way.

every act a robber commits before making his getaway is incidental to the robbery." (*In re Jesse F., supra,* 137 Cal.App.3d at p. 171.)

Defendant points to the prosecutor's argument. The prosecutor told the jury that force and fear were used in several different ways in the course of the robbery. After setting out various instances of the use of force, the prosecutor stated: "Finally, the defendant threatened Juan [M.] several times. That's the use of fear. He threatens to kill him." In discussing why defendant should be found to have aided and abetted the robbery, the prosecutor stated defendant "also threatened [Juan]. To put [Juan] in fear and keep him from resisting to get his hats back, earlier, before the threats, Juan [M.] had tried to get his hat back from Miguel. But after the fighting and during the threats, Juan [M.] stayed in the house with the defendant while Miguel takes the hats. The defendant specifically mentioned the hats. We know that he knows, that he knows he is helping with this crime." Later, the prosecutor stated: "Intimidating a victim charge, you know that Juan [M.] was the victim of a robbery. . . . He asked his wife to call the police, and the defendant threatened him. He said, 'You call the police I'm going to come back and kill everyone.' That's a threat aimed at discouraging him from making a report."

The foregoing in no way precluded the trial court from finding separate intents and objectives with respect to count 3. (Compare *People v. McKinzie* (2012) 54 Cal.4th 1302, 1368-1369, disapproved on another ground in *People v. Scott* (2015) 61 Cal.4th 363, 391, fn. 3, with *People v. McCoy* (2012) 208 Cal.App.4th 1333, 1340.) Defendant has failed to demonstrate imposition of a separate term on that count was improper.

We will order the judgment modified to provide that execution of sentence on count 2 be stayed pursuant to section 654.[17]

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[17] Defendant urges that the asserted error violates his right to a liberty interest created by section 654. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343, 345.) Assuming without determining that section 654 creates such an interest, our modification of the judgment with respect to count 2 cures any such violation, while our rejection of defendant's state law claim with respect to count 3 necessarily leads to the rejection of

IV

SUFFICIENCY OF THE EVIDENCE AS TO PRIOR CONVICTION

Defendant suffered a prior conviction for violating section 245, former subdivision (a)(1). The trial court found it constituted a serious felony that was also a strike. As a result, the court doubled the base term imposed on count 1 and enhanced defendant's sentence by five years. Defendant now contends the evidence was insufficient to prove the strike and serious felony allegations. We disagree.

"The Three Strikes law provides for enhanced punishment for any person convicted of a serious felony who previously has been convicted of a serious felony. [Citations.]" (*People v. Houck* (1998) 66 Cal.App.4th 350, 354; see §§ 667, subds. (d)(1) & (f)(1), 1170.12, subds. (b)(1) & (d)(1).) In addition, a person convicted of a serious felony who has a prior serious felony conviction is subject to a five-year enhancement. (§ 667, subd. (a)(1).) " '[S]erious felony' " includes "assault with a deadly weapon, . . . in violation of [s]ection 245[.]" (§ 1192.7, subd. (c)(31).)

At the time defendant incurred the prior conviction at issue here, subdivision (a)(1) of section 245 proscribed "assault . . . with a deadly weapon or instrument other than a firearm or by any means of force likely to product great bodily injury . . . ."[18] Assault with a deadly weapon is a serious felony; assault by means of force likely to produce great bodily injury is not, absent the additional element of personal infliction of great bodily injury. (*People v. Delgado* (2008) 43 Cal.4th 1059, 1065 (*Delgado*); *People v. Haykel* (2002) 96 Cal.App.4th 146, 149; see § 1192.7, subd. (c)(8).)

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the federal constitutional gloss. (See *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 990, fn. 5.)

[18] Effective January 1, 2012, section 245 was amended so that subdivision (a)(1) of the statute now proscribes assault with a deadly weapon or instrument other than a firearm, while subdivision (a)(4) of the statute proscribes assault by any means of force likely to produce great bodily injury. All references to section 245, subdivision (a)(1) are to the statute as it existed before this amendment.

"Due process requires the prosecution to shoulder the burden of proving each element of a sentence enhancement [or strike allegation] beyond a reasonable doubt. [Citations.]" (*People v. Tenner* (1993) 6 Cal.4th 559, 566.) "On review, we examine the record in the light most favorable to the judgment to ascertain whether it is supported by substantial evidence. In other words, we determine whether a rational trier of fact could have found that the prosecution sustained" that burden. (*Delgado*, *supra*, 43 Cal.4th at p. 1067.) "We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.]" (*People v. Albillar* (2010) 51 Cal.4th 47, 60.)

> "Where, as here, the mere fact of conviction under a particular statute does not prove the offense was a serious felony, otherwise admissible evidence from the entire record of the conviction may be examined to resolve the issue. . . .
>
> "Such evidence may, and often does, include certified documents from the record of the prior proceeding and commitment to prison. [Citations.] A court document, prepared contemporaneously with the conviction, as part of the record thereof, by a public officer charged with the duty, and describing the nature of the prior conviction for official purposes, is relevant and admissible on this issue. . . .
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> "However, if the prior conviction was for an offense that can be committed in multiple ways, and the record of the conviction does not disclose how the offense was committed, a court must presume the conviction was for the least serious form of the offense. [Citations.] In such a case, if the serious felony nature of the prior conviction depends upon the particular conduct that gave rise to the conviction, the record is insufficient to establish that a serious felony conviction occurred.
>
> "On the other hand, the trier of fact may draw reasonable inferences from the record presented. Absent rebuttal evidence, the trier of fact may presume that an official government document, prepared contemporaneously as part of the judgment record and describing the prior conviction, is truthful and accurate. Unless rebutted, such a document,

> standing alone, is sufficient evidence of the facts it recites about the nature and circumstances of the prior conviction. [Citations.]" (*People v. Miles* (2008) 43 Cal.4th 1074, 1082-1083, italics omitted; accord, *Delgado, supra*, 43 Cal.4th at p. 1066.)

In the present case, People's exhibit 8, which was admitted into evidence, was a certified package from the California Department of Corrections and Rehabilitation. It contained the abstract of judgment for defendant's 2009 conviction. That document described the violation of section 245, subdivision (a)(1) as "ASSAULT W/DEADLY WEAPON OT." This description tracked *only* the "deadly weapon or instrument other than a firearm" prong of the statute — i.e., the prong that constituted a serious felony. "The People therefore presented prima facie evidence, in the form of a clear, presumptively reliable official record of defendant's prior conviction, that the conviction was for the serious felony of assault with a deadly weapon." (*Delgado*, *supra*, 43 Cal.4th at p. 1070.)[19]

Defendant produced no rebuttal evidence. He now argues, however, that other portions of the prosecution exhibits "create[d] an ambiguity" we cannot resolve. He specifically points to a document contained in People's exhibit 8 that bears the heading "FEDERAL BUREAU OF INVESTIGATION, UNITED STATES DEPARTMENT OF JUSTICE CRIMINAL JUSTICE INFORMATION SERVICES DIVISION," and an address. That document describes defendant's conviction as "FORCE/ADW NOT FIREARM:GBI." Defendant also points to People's exhibit 16, a certified California Law Enforcement Telecommunication System (CLETS) rap sheet printout, which reflects a conviction for "245(A)(1) PC-FORCE/ADW NOT FIREARM:GBI LIKELY."

In deciding whether a particular prior conviction qualifies as a serious felony, "[t]he trial court's role is limited to determining the facts that were necessarily found in

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19 Reaching this conclusion did not require the trial court to engage in any prohibited fact finding. (See *People v. Gallardo* (2017) 4 Cal.5th 120, 124-125, 134 (*Gallardo*).)

the course of entering the conviction." (*Gallardo*, *supra*, 4 Cal.5th at p. 134.)[20] The trial court's inquiry in this regard "*is limited to an examination of the record of the prior criminal proceeding* to determine the nature or basis of the crime of which the defendant was convicted. [Citations.]" (*People v. McGee* (2006) 38 Cal.4th 682, 691-692, italics added, disapproved on another ground in *Gallardo*, *supra*, 4 Cal.5th at p. 125.)

The exhibits referenced by defendant are not part of the record of defendant's prior conviction. While they were admissible and could properly be considered for purposes of establishing the fact of a conviction, identity, and service of a prison term for a prior felony conviction, they were not admissible and could not properly be considered for the purpose of establishing the nature and circumstances of the conduct underlying the prior conviction. (See *People v. Martinez* (2000) 22 Cal.4th 106, 116; *People v. Banuelos* (2005) 130 Cal.App.4th 601, 606; *People v. Dunlap* (1993) 18 Cal.App.4th 1468, 1471, 1476.)[21] There is no suggestion the trial court used them for an improper purpose. Accordingly, they did not create any ambiguity vis-à-vis the abstract of judgment. That document showed defendant was convicted of assault with a deadly weapon other than a firearm. It was sufficient to permit a rational trier of fact to conclude defendant was convicted of a serious felony. (Compare *Delgado*, *supra*, 43 Cal.4th at pp. 1069-1070 [abstract of judgment describing violation of § 245, subd. (a)(1) as

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20 "This means that a sentencing court may identify those facts it is 'sure the jury . . . found' in rendering its guilty verdict, or those facts as to which the defendant waived the right of jury trial in entering a guilty plea. [Citation.] But it may not 'rely on its own finding' about the defendant's underlying conduct 'to increase a defendant's maximum sentence.' [Citation.]" (*Gallardo, supra,* 4 Cal.5th at p. 134.)

21 We need not decide whether the same is true of People's exhibit 12, a Criminal Justice Information System (CJIS) register of actions for defendant's 2009 case. That document shows that in the course of entering his plea of nolo contendere to the violation of section 245, subdivision (a)(1), defendant was advised of the consequences of a plea to a strike or serious felony. It further shows that at sentencing, the weapon was "ordered confiscated and used or destroyed" (capitalization omitted).

" 'Asslt w DWpn' " sufficient to permit rational trier of fact to find beyond a reasonable doubt that prior serious felony conviction occurred] with *People v. Rodriguez* (1998) 17 Cal.4th 253, 261-262 [abstract of judgment describing violation of § 245, subd. (a)(1) as " 'ASLT GBI/DLY WPN' " proved nothing more than least adjudicated elements of charged offense, so insufficient to prove serious felony conviction] & *People v. Banuelos*, *supra*, 130 Cal.App.4th at pp. 605-606 [abstract of judgment describing violation of § 245, subd. (a)(1) as " 'ASSAULT GBI W/DEADLY WEAPON' " ambiguous, so insufficient to establish deadly weapon in fact used during commission of offense].)[22]

V

SENATE BILL NO. 1393

At the time defendant was sentenced, trial courts lacked discretion to strike or dismiss a five-year serious felony enhancement. (§§ 667, former subd. (a)(1), 1385, former subd. (b).) This bar was removed by Senate Bill No. 1393 (Stats. 2018, ch. 1013, §§ 1-2), which went into effect on January 1, 2019.

Defendant contends, and the Attorney General concedes, the amendments apply because defendant's conviction is not yet final, and the matter must be remanded so the trial court can consider whether to strike the enhancement. (See *In re Estrada* (1965) 63 Cal.2d 740, 744; *People v. Garcia* (2018) 28 Cal.App.5th 961, 973.) We agree. We find a remand appropriate since, although the court declined the defense request to dismiss his

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[22] In *People v. Hudson* (2018) 28 Cal.App.5th 196, this court found insufficient evidence of a prior serious felony conviction despite the fact the abstract of judgment described the violation of section 245, subdivision (a)(1) as " 'Assault w/deadly weapon.' " (*Hudson, supra*, at pp. 201, 202-203, fn. 3.) *Hudson* is distinguishable from the present case, however, since it involved a possible conflict between the accusatory pleadings and the abstract of judgment, and the trial court engaged in impermissible fact finding by relying on the preliminary hearing transcript to find a disputed fact about the conduct underlying the conviction that had not been established by virtue of the conviction itself. (*Id.* at pp. 202-203 & fn. 3, 208-209.)

prior strike conviction (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497), it imposed far less than the maximum possible sentence, and made no comments suggesting whether it would have imposed the five-year enhancement had it had discretion in the matter.[23]

DISPOSITION

The judgment is modified to provide that execution of sentence on count 2 is stayed pursuant to Penal Code section 654. As so modified, the judgment is affirmed.

The matter is remanded to the trial court with directions to exercise its discretion under Penal Code sections 667, subdivision (a)(1) and 1385, as amended by Senate Bill No. 1393 (Stats. 2018, ch. 1013, §§ 1-2, eff. Jan. 1, 2019), and, if appropriate following exercise of that discretion, to resentence defendant accordingly.

The trial court shall cause to be prepared an amended abstract of judgment that reflects the foregoing modification and any additional change in sentence, and shall cause a certified copy of same to be transmitted to the appropriate authorities.

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DETJEN, J.

WE CONCUR:

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POOCHIGIAN, Acting P.J.

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PEÑA, J.

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[23] We express no opinion on how the trial court should exercise its discretion.